United States of America

# Congressional Record

PROCEEDINGS AND DEBATES OF THE 107th CONGRESS, SECOND SESSION

WASHINGTON, FRIDAY, JULY 12, 2002

## *Senate*

# PUBLIC COMPANY ACCOUNTING AND INVESTOR PROTECTION ACT OF 2002

Mr. CARPER. Madam President, I know the Senator from Maryland is getting tired of receiving all these bouquets, but he deserves them. Senator *Enzi* is not on the floor, but he deserves one or two as well, along with others of our colleagues, not just on the Banking Committee but other Members as recently as this morning who offered amendments to this legislation which improve it materially, especially the amendment offered by the Senator from Missouri, Mrs. *Carnahan*. It is all well and good that we say to those who are senior officials within companies, if you have a stock transaction, you have to report it. Give them the paperwork, they report it, and it goes somewhere where few people ever have a chance to see it or be aware of it. It is quite another thing to list that transaction, do it electronically so anyone who has access to the Internet can find out about it. Senator *Carnahan*'s amendment includes this electronic disclosure, and that is a very good improvement to the legislation.

I like what the Senator from North Dakota, Mr. *Dorgan*, has offered today, with respect to the process where we have companies normally registered and incorporated here in a State in America who somehow slip off to Bermuda and incorporate. We actually provide an incentive; if we don't adopt the Dorgan amendment, we provide an incentive for that kind of behavior. Not only does that have an adverse effect on States such as New York or Delaware or Maryland or Pennsylvania, it also has an adverse effect on shareholders because the heads of companies that are registered or incorporated in a place such as Bermuda would otherwise not have to sign off and vouch for the financial statements they are providing.

Even as recently as this morning, a good bill has gotten better.

I appreciate the amendment offered earlier by Senator *Lott* on behalf of the President and the addition of a number of provisions in the bill that the administration supports, and, frankly, I think we all should.

I came across an interesting column this week. I didn't know if I would read it, but given that the Senator from New York is presiding, I have to at least read the first paragraph. This is a column by a fellow who writes in the LA Times and is syndicated across the country, Ronald Brownstein. I will read a paragraph and perhaps ask unanimous consent that the entire column be printed in the **RECORD**.

There being no objection, the material was ordered to be printed in the **RECORD,** as follows:

Bush Needs to Drop the Velvet Glove Approach .

It's easy to imagine the frenzy that would be engulfing Washington if it was President Clinton now revising his explanation of a controversial 12-year-old stock deal.

Bush Limbaugh would be roaring in outrage. Robert H. Bork would be decrying

the loss of moral authority in the Oval Office. Sen. Arlen Specter, R-Pa., would be demanding a special prosecutor. Congressional committees would be subpoenaing the president's old business partners.

President Bush probably will be spared all that, even after suddenly altering his explanation for why he was eight months late in reporting to the Securities and Exchange Commission his 1990 sale of stock in Harken Energy Corp., a company on whose board he sat, shortly before it announced large losses. (For years he blamed it on the SEC; now he's fingering Harken's lawyers.)

After the fanatical ethics wars of the Clinton years, few in Washington have much stomach for a full-scale confrontation--though the Washington Post raised eyebrows by revealing Bush's former personal attorney was the SEC general counsel at the time commission cleared him of wrongdoing in the stock sale. The attorney, James Doty, says he reused himself.

The demands of the war against terrorism also will discourage a political firefight over the sale. But even so, the disclosures were still creating awkward moments for Bush as he prepared to call for greater corporate responsibility.

Actually, the focus on Bush's behavior 12 years ago may frame the wrong debate. It's likely that the dominant argument in Washington will be over whether it's credible for Bush to demand better corporate behavior while facing these personal questions. The more relevant issue is whether it's credible for Bush to threaten a crackdown now after his administration spent its frist 18 months promising business kinder and gentler enforcement of the range of federal laws against corporate misconduct--from the environment to the stock markets to the workplace.

In other words, can Bush plausibly shake the iron fist after stroking the Fortune 500 for so long with a velvet glove?

For all the nouvelle elements of Bush's thinking on social issues such as education or home ownership, he's always been a conventional conservative on government oversight of business. As governor of Texas, presidential candidate and president, Bush has focused more on intrusive government than irresponsible corporations.

His consistent message has been that, in pursuing its goals and enforcing its laws, government should be more cooperative and less coercive. During the 2000 campaign, he crystallized his view on government's relationship with business when he insisted: ``I do not believe you can sue you way or regulate your way to clean air and clean water."

Bush has put flesh on that philosophy by staffing many federal agencies with alumni of the industries they now regulate. The Interior Department is crowded with former lobbyists for the coal and oil industries. A former timber lobbyist is watching the national forests Harvey L. Pitt, the SEC chairman, came from the accounting industry; Bush already has appointed another accounting industry alum to the five-member commission and nominated yet a third. (That means Bush is seeking to construct an SEC, for the first time, with a majority of commissioners tied to accounting.)

To monitor safety in the workplace, Bush found an executive from the chemical industry. To monitor safety in the mines, he appointed an executive from the mining industry. The list goes on.

In chorus, Bush's appointees have sung the same tune. At her confirmation hearing last year, Environmental Protection Agency Administrator Christie Whitman promised more negotiation and less litigation against recalcitrant companies. ``Instilling fear does

not solve problems," she insisted.

Over at the Occupational Safety and Health Administration, director John Henshaw as late as last month told a business audience: ``Hopefully we can put the days of OSHA as an adversary behind us."

And before Enron and WorldCom and Martha Stewart forced the SEC chair to try to morph into Harvey Pitt-bull, he was sending the same message, telling the accounting industry last fall that he viewed them as the agency's ``partner" and pledging ``a new era of respect and cooperation" after the confrontations of the Clinton years.

Partnership with industry has its place. But enforcing federal law to police the market place isn't it. No cop anywhere would agree with Whitman; they instead would argue that the best way to discourage drug dealing or street crime is to instill fear--of relentless enforcement. The same is true in the boardroom. Polluters or stock swindlers are more likely to stop because they fear being caught than because Washington asks them nicely.

Mr. CARPER. Here is the first paragraph:

It's easy to imagine the frenzy that would be engulfing Washington if it was President Clinton now revising his explanation of a controversial 12-year-old stock deal. Rush Limbaugh would be reacting in outrage. Robert Bork would be decrying the loss of moral authority in the Oval Office. [One of our Senators] would be demanding a special prosecutor. Congressional committees would be subpoenaing the president's old business partners.

This is a whole lot more important than trying to find political advantage in a particularly difficult debate and a difficult time in this economic recovery. This is about the economy.

As a nation, we are trying to come out of a recession. There is a fair amount of financial data which suggests we are heading in the right direction. The number of people being laid off is slowing. Manufacturing activity is increasing. Even economic activity among some of the most hard-hit sectors of the economy, technology sectors, is showing signs of life. I am encouraged by that.

If you look at the stock exchange for much of the last several weeks and months, it does not really reflect the returning, emerging vibrancy in the rest of the economy. That is not a good thing.

One of the reasons why it is so important for us to pass this legislation is to send a clear signal to investors not just around the country, but around the world that the United States is a good place in which to invest. Our trade deficit last year was about $300 billion. This year it is going to be even more than $300 billion.

We are starting to see the value of American currency, the dollar, which was robust and strong for the last several years, deteriorate. The worst thing that could happen for us, at a time when we need to attract foreign investments, would be to send a message that the United States is not a good or safe place in which to invest. When we are looking to much of the rest of the world to help finance a trade deficit of over $300 billion, it is important that we send a strong message throughout the world that the U.S. remains the best place in which to invest.

There are a number of provisions. I will not go through this bill provision by provision. I want to talk about some of the groups that have the greatest interest, the most at stake, what our obligation is to them, and how this legislation seeks to make sure that we not only recognize that obligation but that we act on it.

Shareholders of companies, publicly traded companies, should have confidence. They should have confidence not only in the CEOs and top officials, but they should have confidence in the board of directors whose

job it is to represent the interest of the shareholders and to know that that board is indeed independent. Shareholders should have confidence in the audit committees of the board. Investors should know that the audit committees of the board are comprised of independent-minded board members, knowledgeable board members who will act, not as a lap dog, but as a watchdog every day as they serve on the audit committee.

Shareholders should have confidence that there are rigorous auditing standards that exist in this country and not that there are rigorous auditing standards that are on a piece of paper somewhere, but there is a strong, independent, knowledgeable entity that is going to make sure that those auditing standards are enforced.

How about the auditors of publicly traded companies? We should take away from them the temptation to look the other way or give the benefit of the doubt to a company that they are auditing because of the temptation from some other part of the auditing company which deals with consulting services; in many cases, these are lucrative services. We want to make sure the folks doing the audits of publicly traded companies are interested in doing a good job because that is their responsibility. Auditors should not be interested in cutting corners, looking the other way because doing so might enable their accounting company to attract and to retain lucrative consulting services.

This bill goes a long way--some would say too far--toward curtailing that activity. To me, it strikes the right balance.

Most of us know of someone who used to work for one of the big eight, then big five, now the big four accounting firms who actually went to work for one of the companies that they audited. I do. I suspect all of us could think of someone who has made that transition in their lives. There is nothing wrong with that. However, the revolving door can be more troublesome when the person moves from the auditing company one day, the company responsible for doing the audit, and the next day, the next week, the next month ends up as a senior official of the company that last week, last month they were auditing.

This measure doesn't completely stop that revolving door, but it slows it down.

Another area that this bill tries to address is the question: How often is it appropriate to have a fresh set of eyes in charge of those independent auditors doing that independent audit of a publicly traded company? Under current standards every 7 years we say that the lead partner of an audit should be changed. This measure takes it down to 5 years. Not everyone agrees with that. Some would like to have a change in auditing companies, requiring auditing companies to rotate every 5 or 7 years. I don't think that is a good idea. I do believe the approach we take in this measure, moving from 7 to 5 years the period of time after which the lead auditor, the lead partner has to be changed, is sound.

How about investors? I talked about shareholders, about the auditors themselves. How about investors? The investors in this country and other countries need to be comforted by the knowledge that when they hear an analyst on television or read of an analyst's recommendation of a particular stock or stocks, when an analyst says buy, they mean buy. When an analyst says sell, they mean sell. When an analyst says hold, they mean hold.

Investors have the right to know that the analysts whose advice they are following or attempting to follow are not being pressured to color their recommendations of a buy, sell, or hold by what is happening on the investment banking side of the business, and to know that the analyst's compensation is going to be derived more from how well the analyst does his job, providing good analysis

and investment advice, and not about how much new business that analyst can help bring to the investment banking side of their company.

How about the CEOs and senior management? When they break the law, they should be fully prosecuted under the law, and if what they have done is an offense for which they can be imprisoned, they ought to be. Our job in the Congress is to pass laws and to say what the crime or penalty should be when people violate those laws.

It is the job of the Justice Department to fully prosecute--with the help of the SEC and the other watchdog agencies--people who violate the laws. Senator *Leahy*, on behalf of a number of Senators, earlier this week--yesterday, I believe--offered legislation that provides a new law that says not only can we prosecute some of the corporate wrongdoers--I am tempted to call them criminals, but I won't--who violate the trust, and to not only say you have to go after them under the mail and fraud provisions of the criminal code, but to broaden that--which is sometimes difficult to do--and make the prosecutions more easily done and with very tough penalties under another part of the code.

CEOs should not be allowed to profit from financial misinformation or from manipulation of their books. I commend the President and those who have worked on this legislation to say, to the extent that this does happen--a CEO or senior official benefits financially from tampering or cooking the books--they would be compelled to give that money back.

I mentioned earlier the legislation offered by Senator *Carnahan* of Missouri which would actually make sure there is a disclosure of sale when a CEO or senior official sells their stock; that the transaction would not only have to be reported to the SEC, but disclosed electronically.

Another provision in the bill that I think is especially good and timely, given what has gone on at WorldCom, where apparently a senior official of that company received a $360 million loan from the company--a loan which I don't believe the shareholders ever knew about--at least when they found out about it, it was too late for a lot of them. That kind of information should be fully disclosed promptly and through a medium that allows those who have some need to know--investors and shareholders--to have that information in a timely way.

Finally, a word about the employees who work for some of these companies that have gone through, or are going through, a meltdown. They need, I think, recourse when they are urged, on the one hand, by senior officials to buy company stock for their 401(k) investment plans at the very time when senior officials are bailing out of the company stock. There should be some kind of recourse for employees when that happens. In the belief of what is good for the goose is good for the gander, employees should never again face the situation that Enron employees faced where, during a lockdown period of time, employees could not sell their stock while senior officials were able to bail out and sell their stock. What is good for the goose is good for the gander. To the extent that employees in a lockdown period are not able to sell their company stock in their 401(k) plan, the senior officials of the company should not be able to enter into transactions involving their stock either.

There is one thing I don't believe we address in this bill; the others I mentioned, we do. One area we do not address--and I suspect it comes later--and a member of the staff will tell me if I am mistaken. One of the problems we have with 401(k)s for the employees, the investors, is that they don't get very good advice. The companies don't want to be held liable if they provide bad

advice when all is said and done. And when we move on to other issues, I hope we will have agreed on a way to better ensure that the employees who are not getting very good advice do get that good advice.

I worry about the concentration of assets and investments. I know some people believe there should be a cap and that they should not be able to invest any more than half or a quarter in company stock for your 401(k). If I am an employee and I am buying company stock, maybe I should have to sign a form that is an acknowledgment that I am about to do something very stupid--something similar to what the employees did at Enron, where they put all their eggs in one basket--and acknowledge that is not a bright thing to do, and acknowledge that I am doing that unwise thing myself. Maybe that is needed here. In addition to that kind of disclosure, I think we do need to address the need for better advice for employees.

I will go back to where I started; that is to say, a lot is riding on this legislation--a whole lot more than we would have guessed 6 months ago. Six months ago, as we saw Enron melt down and the disclosures come forward, we thought it was one company that was poorly run, maybe fraudulently run. A lot of people were hurt who worked at that company. A lot of people who worked for the auditor, the accounting firm, Arthur Andersen, have lost their jobs and were, frankly, fully innocent, but they have been harmed. Six months ago, there was a full sense of outrage at Enron and the people who led it to its fall.

We know now that what happened at Enron may not be precisely the same as other companies, but it is symptomatic of the behavior in other companies, where the people who run those companies do not meet their obligations to the shareholders, to the employees, and where greed has corrupted too many people. While it is difficult for us to pass a law outlawing greed, we can try to outlaw fraud. But it is tough to do that; I acknowledge that.

With the developments within a whole host of other companies--disclosures of financial mismanagement and misstatements, misrepresentation of performance of other companies in recent months--the importance of what we are doing this week and next has grown. We need to get this economy moving in the right direction. I believe that, underneath, a lot of the fundamentals are pretty sound. If you look at growth, and productivity, and the manufacturing activity to which I alluded earlier, there is some good news. The troubling news is what is going on in the stock market, as investors are skittish, and that is understandable.

We can begin to restore, in a very meaningful and tangible way, the confidence of those investors in America and in American companies, and we ought to do that.

The last word I will say is this. I commend Chairman **SARBANES.** He is not presently on the floor. I also commend the committee staff and personal staffs for the kinds of hearings that have been held this year which have led us to this day. Chairman **SARBANES** is not the sort of person who is interested in rushing out and being on television every night. He is not interested so much in seeing his name or picture in the newspaper. He is interested in getting at the truth. I think the hearings that were held over many months have led us to finding the truth and, maybe just as important, to finding the right course for us to take as a nation, to be able to right some of the wrongs that have been done and to reduce the likelihood that further wrongs will occur in the future.

I know some have been impatient for us to get to this day and to take up this legislation, pass it, and to send it to the President. I think it has been worth the wait. I acknowledge

that not everything that needs to be done ought to be done by the Congress. The stock exchanges have made a number of excellent changes, and they are to be commended. Many companies and many corporate boards, that have sort of been tarred with the same brush, and senior officials and CEOs who are doing a good job in acting and behaving in a most important way, have been tarred and feathered with the same brush.

A lot of companies have said, themselves, they have taken a look in the mirror--boards of directors, audit committees, and others--and said: We can do better. And they have adopted reforms. Shareholders--market forces--have come to bear on companies, their boards of directors, as they should, and that is helpful as well.

In the end, there are some things the Congress can do and ought to do, maybe not all of them, but a lot of them are included in this legislation before us. I am proud to have participated as a member of the Banking Committee in its development and proud to be a witness to the work that is going on in this Chamber to make a good bill even better. I yield the floor.